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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969
No. 292

MILFORD FULLER ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITIONER FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS
BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Both opinions of the Supreme Court of Arkansas concerning petitioner's case have been properly noted in the petition for writ of ceretiorari and have been set forth verbatim in the appendix which accompanies the petition.

JURISDICTION

The authority on which petitioner relies to invoke the jurisdiction of this Court is also contained in the petition.

STATEMENT

On November 9, 1967, appellant along with Leo Walton was accused of the crime of possession of stolen goods in that they were in possession of a color television and stereo record player. Both were found guilty of the crime and the jury being unable to set the punishment, the court sentenced each appellant to four years in the Arkansas State Penitentiary.

They appealed the case to the Supreme Court of Arkansas which reversed and remanded the case for a new trial. *Fuller & Walton* v. *State of Arkansas,* 245 Ark. 91, 431 S.W. 2d 462. A new trial resulted in a conviction with petitioner and his co-defendant receiving a 10 year sentence which punishment was fixed by the jury. They again appealed the case and it was affirmed in *Fuller & Walton* v. *State of Arkansas,* 246 Ark. 681, 439 S.W. 2d 801. Petitioner Fuller alone petitions this court for certiorari and presents three questions to the Court.

ARGUMENT

It is submitted that the Petition for Writ of Certiorari does not disclose any substantial issue of law which warrants review by this Court. The record in this case fails to support the conclusion that petitioner was deprived of any right under the Constitution of the United States. Respondent is benefited by the studied and lengthy opinion of the Supreme Court of Arkansas affirming petitioner's conviction. This decision is correct and in accordance with the several pronouncements of this Court.

I

Whether error was committed in holding that a television set and record player were admissible into evidence regardless of the fact that their disclosure was during a search being conducted under the authority of an invalid search warrant.

Petitioner in presenting this question to the court relies on the case of *Bumper* v. *North Carolina*, 391 U.S. 543. That case can readily be distinguished from the case at bar. In *Bumper*, the consent to search relied upon was to search for the very articles and the very place named in the invalid search warrant. In the present case, the articles seized and the place that was searched were not named in the invalid search warrant. Hence, that case is no authority for excluding from evidence the stereo record player and the color television set.

In two well reasoned opinions concerning petitioner in our State Supreme Court, our Court held that these articles seized could be properly introduced in evidence. We invite this Court to carefully read those decisions and we think that the language contained therein should be per-

suasive on this Court in deciding this case. The pertinent language is as follows:

> "Appellants' first and fourth points have already been decided adversely to their contention in *Walton and Fuller* v. *State, supra,* and our decision there becomes the law of this case as to the admissibility of evidence as to the television set and the record player which defendant "voluntarily" pointed out to the officers at the time of the second search. In that case we held this evidence to be admissible regardless of the fact that the voluntary disclosure was made at a time when the search was being conducted under the authority of the defective warrant. On this point we said:
>
> > " . . . Walton, in the presence of Fuller, voluntarily advised Sheriff Hickman of Boone County and Sgt. Rife that there was a quantity of other property besides the television sets for which the search was being conducted, and that he wanted to show them where it was. He told them that he had certain suits of clothing and the television set and record player upstairs in his living quarters. . . . *Under these circumstances, the property found in the Walton living quarters and his statements about them were not come about through exploitation of an illegal search . . .*
> >
> > *For the reasons above set out, the television set and record player were admissible in evidence."* (Emphasis supplied.)

II

Whether error was committed in holding that statements given officers were admissible into evidence, even though the product of a search and seizure under an invalid search warrant.

In presenting this question to the Court, petitioner relies on the case of *Fahy* v. *Connecticut*, 375 U.S. 85. The *Fahy* case can readily be distinguished from the case at bar. The confession was obtained by the police as direct and proximate result of the illegal search and seizure under an invalid search warrant. In the present case the confession was not a direct and proximate result of an illegal search and seizure under an invalid search warrant. The statements were obtained as a result of a search and seizure of articles not named in the invalid warrant and from a place not named in the invalid warrant. The search and seizure being legal, it necessarily follows that the statements were not tainted and are admissible in evidence.

In the first case concerning petitioner, our Supreme Court held that the statements of petitioner and his co-defendant were voluntary and admissible in evidence. Even so, they still contended in their second appeal that they did not waive their constitutional rights under the holding of *Miranda* v. *Arizona*, 384 U.S. 448.

In order to test the voluntariness of the statements, they filed a motion to suppress the statements and the trial court held a *Denno* hearing in accordance with the holding of *Jackson* v. *Denno*, 378 U.S. 368. After hearing the evidence the trial court found that the statements were voluntarily made and permitted them to be introduced in evidence.

We think the trial court was correct in permitting the statements to be admitted into evidence and submit that the language contained in the opinion of the Supreme Court of Arkansas on this point should be persuasive with this Court. There, they said:

"Although objection was made to the statements made in the prosecuting attorney's office as being inadmissible under the rule announced in *Miranda* v. *State of Arizona*, 384 U.S. 448, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), we find adequate evidence to support the trial judge's finding that the warnings required by that rule were given, and that the statements were voluntary and made under waiver of the rights enumerated in the above case. Neither Walton nor Fuller was in custody at that time on any charge. Before interrogation, both were advised of their rights as to the giving of statements. There is nothing to indicate that either was not intelligent enough to understand the statement of his rights. Nor does it appear that either was not conscious that he was waiving them in answering questions. Walton actually signed a written waiver, on which his constitutional privilege against self-incrimination and right to counsel are clearly and fully listed. There is no indication that this was not a free and voluntary act on his part. While Fuller did not sign the waiver, there is testimony that an identical statement of his rights were read to and by him before any interrogation, after which he expressed his willingness to answer questions. It was only after the interrogation was virtually concluded that he was asked to sign a written waiver of these rights, and he then stated that he wanted a lawyer 'if it got down to where he had to sign something.' In addition to the warnings at the time of the interrogation of Walton and Fuller in the prosecuting attorney's office, the evidence that both were advised of these rights at the time of the search is convincing."

III

Whether error was committed in sentencing petitioner to a longer term, ten years, upon a retrial of his case after a reversal of a sentence of four years for errors under the Constitution of the United States.

In the first trial the jury, after finding petitioner guilty, was unable to agree on the amount of punishment to be given. The trial judge then fixed his punishment at four years in the State Penitentiary. After reversal, and on retrial a jury again found petitioner guilty and fixed his punishment at 10 years in the State Penitentiary.

Prior to our Supreme Court decision in the present case our Federal courts had wrestled with the problem presented in this case many times. There appear to be three rules which grew out of those cases. They were as follows:

1. Allow more severe sentencing without limitation *U. S.* v. *Russell*, 378 F. 2d 808.

2. Impose an absolute prohibition on increased sentences. *Patton* v. *North Carolina*, 381 F. 2d 636.

3. Prohibit increased sentences unless evidence occurred and came to the court's attention, subsequent to the first sentence which evidence warrants an increased penalty. *Marano* v. *U.S.*, 374 F. 2d 583.

The question appears to have been layed to rest in the case of *North Carolina* v. *Pearce*, 395 U.S. 711. In that case this Court held that there was no constitutional bar to a criminal defendant receiving a greater sentence on retrial. However, this Court did strike down the sentences in that case because credit was not allowed for previous service in the Penitentiary for the same offense and it appeared that the greater sentence was imposed

by the trial judge because the criminal defendant had exercised his constitutional rights of appeal. Those problems are not present in the case at bar.

Here, petitioner is on bond and has not served any time in the Penitentiary under his first conviction. Be that as it may, a defendant is allowed time for service in the Penitentiary. See *Kimble* v. *State of Arkansas*, 246 Ark. 407, 438 S.W. 2d 705.

Further, in this case, we do not have the problem of punishing a criminal defendant with a greater sentence on retrial if he is successful in getting a reversal of his first conviction. In Arkansas, under *Ark. Stat. Ann.* § 43-2145, the jury fixes the punishment at the same time a verdict of guilt is returned. If the jury is unable to agree on the punishment, *Ark. Stat. Ann.* § 43-2306 permits the trial court to fix the punishment. In the case at bar, the jury was more severe in fixing the punishment on retrial than the trial court was in fixing the punishment on the original conviction. It must be presumed that the jury knew nothing about and was not punishing petitioner for exercising his right of appeal of his first conviction. Perhaps, if the court had set the punishment at greater than four years on the second conviction a *Pearce* situation might have arisen. But such is not the case. The jury on the second trial fixed petitioner's punishment well within the statutory limits for the crime of possession of stolen property. See *Ark. Stat. Ann.* § 41-3938.

We submit that the reasoning set forth in the second opinion in this case by our State Supreme Court is sound and excellent. We think that this Court should adopt that reasoning and hold that petitioner's rights were not violated in this case because of the greater sentence on retrial. Since the language of our Supreme Court is set out in Appendix A to petitioner's petition, we will not quote it here.

CONCLUSION

Petitioner's assignment of error and his arguments in favor of granting a writ of certiorari are entirely without merit. Certiorari should be denied.

Respectfully submitted,

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